OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

Memorandum OM 95-34 **April 27, 1995**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: William G. Stack, Associate General Counsel

SUBJECT: Litigation of Multiple Charges Against the Same Respondent

In recent years, the General Counsel has litigated several cases that have involved numerous charges which were filed over a lengthy period of time. This has resulted in protracted hearings as the General Counsel has felt compelled to seek consolidation of all meritorious charges in order to avoid a procedural bar to subsequent litigation involving the same respondent. As a consequence, there have been inordinate delays in the resolution of the alleged unfair labor practices. Not only is this unfair to both charging parties and alleged discriminatees, but it also permits a respondent to delay the process by engaging in further unlawful conduct. In short, this process undermines the policies and purposes of the Act. The purpose of this memorandum is to set forth procedures for dealing with this situation.

As a general rule, the Board will, wherever practicable, bar separate litigation of unfair labor practice allegations that are factually intertwined with matters in a prior proceeding and which should have been discovered during the General Counsel's investigation of the prior charge. See, e.g., Jefferson Chemical Co., Inc., 200 NLRB 992 (1972); Peyton Packing Co., Inc., 129 NLRB 1358 (1961).[1] On the other hand, the Board has not interpreted this rule to bar separate litigation of allegations simply because they are based upon facts that the General Counsel knew or should have

[1] In Peyton Packing, the Board stated, in relevant part, that:

> (S)ound administrative practice, as well as fairness to respondents, requires consolidation of all pending charges into one Complaint. The same considerations dictate that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. 129 NLRB at 1360.

known when litigating an earlier case. Thus, if the newly alleged violation bears no relation to any issue in the earlier case, separate litigation is not barred.[2] Similarly, the General Counsel will be permitted to litigate a second case involving the same type of violation litigated in an earlier proceeding if the second case is unrelated in substance or time to the original case.[3]

Moreover, the Board has recognized that there should not be a procedural bar when, shortly prior to a scheduled hearing, the General Counsel discovers additional unfair labor practices or new charges are filed. In Maremont Corp. World Parts Division, 249 NLRB 216 (1980), the Board recognized "the General Counsel's legitimate exercise of discretion in the expeditious litigation of outstanding unfair labor practice complaints." Id. at 217. In rejecting the Respondent's argument that the second proceeding was barred, the Board reasoned that requiring the General Counsel to litigate newly discovered unlawful conduct in the same hearing with the earlier allegations would allow a respondent to "freely violate the Act prior to such hearing, should [the General Counsel] ... be unwilling to submit to delays attendant to the litigation of an amended complaint." Id.

In Harrison Steel Casting Co., 255 NLRB 1426 (1981), the Board found that the General Counsel was not foreclosed from litigating in a separate proceeding a Section 8(a)(3) discharge which occurred approximately two months before the record closed in a series of Section 8(a)(1)(3) and (5) complaints against the Respondent, notwithstanding that this alleged discriminatee, subsequent to his discharge, had been a witness by the General Counsel in the earlier proceeding. The Board noted that to compel the General Counsel to litigate all unfair labor practices in one proceeding "would not only restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct." Id. at 1427. See also Best Lock Corp., 305 NLRB 648 (1991). Memorandum OM 95-34

---

[2] See, e.g., K & K Transportation Corp., Inc., 262 NLRB 1481, 1491 (1982) (General Counsel not precluded from separately litigating unfair labor practice strike issue because no charge filed prior to or during first hearing to which nature of strike was relevant and no evidence that employer had denied strikers reinstatement or that General Counsel knew such a violation would occur in the future).

[3] See, e.g., Gould, Inc., 221 NLRB 899, 899-900 (1975) (General Counsel may separately litigate allegations of coercive and discriminatory conduct by supervisors where allegations in each case were substantively distinct because they involved different supervisors and employees, where conduct occurred during different time periods in each case and where new charges were all filed after first hearing closed).

In view of these cases, generally, the Regions should not postpone the commencement of a scheduled hearing due to either newly filed charges or newly discovered evidence of possible unfair labor practices. Similarly, the Region, generally, should not move for a continuance in the hearing due to the pendency of the Region's investigation of new charges. However, Counsel for the General Counsel should advise the administrative law judge on the record that there is another charge pending investigation and that a motion to amend may be forthcoming if the charge is meritorious and there is time to do so before the record closes in due course. Any motion to postpone which is thereafter filed by the respondent in response to this statement should be opposed.

The Regions should argue that Maremont, Harrison Steel and Best Lock hold that allowing a respondent to delay indefinitely litigation of unfair labor practice charges by simply committing additional violations contravenes the policies and purposes of the Act and, therefore, there is no procedural bar to separate litigation of the new allegations. It is recognized that in these cases the Board noted that the newly discovered evidence or new allegations were not "closely related" or "intertwined" with the allegations in the outstanding complaint. It should be argued that these statements were merely dicta and, thus, were not an essential element of the Board's holding.

Further support for the argument is found in Peyton Packing, which stated that "wherever practicable" there should be one hearing on all outstanding allegations. It should be argued that it is not "practicable" to consolidate all allegations in one proceeding when the result would be a substantial delay in the completion of the hearing even when the new allegations are closely related. Of course, if the allegations in the new charge are arguably not closely related to the earlier allegations, the Region should make this additional argument in support of separate proceedings.

There may be situations where it would best effectuate the policies of the Act to consolidate the cases notwithstanding the necessity to postpone the hearing. For example, the new violations may provide additional evidence regarding the unfair labor practice allegations or requested
remedy in the initial case. In the typical case, however, it is expected that

the Region would not postpone the initial hearing.

If you have any questions, please contact me or your Assistant General Counsel.

W.G.S.